Filed 12/23/15 Cuevas v. City of Campbell CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SAMMY CUEVAS, Plaintiff and Appellant, v. CITY OF CAMPBELL et al., Defendants and Respondents.	H039233 (Santa Clara County Super. Ct. No. 1-12-CV220122)

Appellant Sammy Cuevas appeals the trial court's denial of his petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5), which challenged a decision of the City Council of respondent City of Campbell upholding the City of Campbell Police Department's (Department) decision to terminate appellant's employment as a police officer.[1] On appeal, appellant contends the trial court erred in denying his petition because: (1) Department disciplinary policies, as well as respondents' enforcement of those policies, violated appellant's federal and California Constitutional rights; (2) the City Council's decision that appellant violated those policies was not supported by substantial evidence; and (3) the decision to terminate appellant was an abuse of discretion. For the reasons stated here, we will affirm the judgment.

[1] Respondents are the City of Campbell and City Manager Daniel Rich.

I. ADMINISTRATIVE AND TRIAL COURT PROCEEDINGS

A. 2009 DISCIPLINARY INVESTIGATION

Appellant was hired as a police officer by the Department in April 2008. In February 2009, while appellant was a probationary employee, Sergeant Dan Livingston began an investigation of appellant when another officer expressed concerns about appellant's alleged interactions with " 'parolee types.' " Appellant was represented by counsel during the investigation. From interviews with appellant and independent research, Sergeant Livingston learned that appellant had been interacting with individuals named Oscar Padilla and Joseph Aguilera while working for the Department. Oscar Padilla had an extensive arrest record between 1994 and 2009, including a two-year prison term for drug-related offenses committed in 2002. Appellant admitted interacting with Padilla while employed by the Department and stated that Padilla had recently helped him move to a new residence.

Appellant told Sergeant Livingston that Aguilera was married to appellant's cousin Antonia Lopez and had a child with her but that Aguilera and Lopez were presently separated. Appellant knew Aguilera had been "validated" as a member of the "Northern Structure" gang but appellant did not think Aguilera was an active gang member. Sergeant Livingston's report stated that a confidential informant had identified Aguilera in 2009 as an active gang member. Appellant admitted extensive associations with Aguilera while working for the Department, including having lunch, exercising with him, and participating in the baptism of Aguilera's daughter (appellant's niece).

In addition to discussing his interactions with Padilla and Aguilera, at the April 2009 investigative interview appellant discussed Kim Villegas, with whom he had lived for a number of years. About a month earlier appellant said he had found cocaine in the bathroom of the house he shared with Villegas and said he had recently moved out. Appellant explained that he moved out because Villegas was partying too much and that after he found the cocaine he told himself " 'I can't deal with this. I cannot be associated

with this.' " He also stated that he moved because he determined Villegas's conduct conflicted with his duties as a police officer. Appellant did not disclose any details about his new living situation.

Sergeant Livingston recommended finding that appellant violated Department Policy 340.3.5(v), which prohibits "[s]ubstantiated, active, continuing association on a personal rather than official basis with a person or persons who engage in or are continuing to engage in serious violations of state or federal laws, where the employee has or reasonably should have knowledge of such criminal activities, except where specifically directed and authorized by the Department." Based on that investigation, in July 2009 Chief of Police Gregory Finch found appellant had violated Policy 340.3.5(v) and suspended him for 36 hours without pay. Chief Finch's letter stated that Policy 340.9 "gives a probationary employee an opportunity to appeal disciplinary action, however, it shall be limited to an opportunity for the employee to attempt to establish that the allegations should not be sustained." Appellant did not appeal the disciplinary decision or take any action to challenge the allegations.

Chief Finch met with appellant regarding his suspension along with two police captains. Chief Finch forbade appellant from associating with Aguilera or Padilla and told appellant that if he associated with either individual he was required to report that association to "command staff," which appellant understood to mean a captain. Appellant's superior officers recognized that because he was related to Aguilera incidental contact was possible and advised him that while they did not expect him to "run away" if he saw Aguilera in public, they also did not want him to "hang out with him."

B. 2010 DISCIPLINARY INVESTIGATION

In June 2010, Sergeant Richard Shipman initiated a second disciplinary investigation into appellant's activities. As part of this investigation, a tracking database collector was placed on appellant's personal car to track his movements. Sergeant

Shipman's report made the following seven factual allegations and tied each allegation to a violation of one or more Department policies. First, when appellant met with Chief Finch in July 2009 about the 2009 investigation he was already living with his cousin Antonia Lopez (Aguilera's estranged wife) but did not advise Chief Finch of this detail. Sergeant Shipman contended this omission violated Policy 340.3.5(ab), which prohibits "[g]iving false or misleading statements, or misrepresenting or omitting material information to a supervisor ... ."

Second, appellant never notified the Department he had moved to Lopez's house in March 2009; he notified the city's human resources department of his address change in October 2009 only after receiving an e-mail inquiry, and listed the effective date of the change as September 1, 2009 on a form he submitted to human resources. Appellant had been informed in January 2009 via e-mail about the need to fill out two change of address forms; one for the Department and one for "HR." These acts allegedly violated Policy 340.3.1(d) (requiring officers to notify the Department of a change in residence address within 24 hours) and Policy 340.3.5(o) (prohibiting misrepresentation of material facts on official documents).

Third, appellant interacted with Aguilera while at appellant's grandmother's funeral without informing command staff and did not explain the full extent of his contact when he told Sergeant Joe Cefalu about the interaction. Sergeant Shipman claimed appellant's failure to notify command staff constituted disobedience and insubordination (Policy 340.3.5(e)) while the incomplete disclosure to Sergeant Cefalu was a false or misleading statement to a superior (Policy 340.3.5(ab)).

Fourth, in May 2010, while appellant was on disability leave for an ankle injury, Sergeant Cefalu observed appellant in a state of intoxication in downtown Campbell, constituting conduct unbecoming an officer (Policy 340.3.5(z)).

Fifth, in June 2010, while appellant was still on disability leave, Sergeant Livingston observed appellant dancing at a bar with Kim Villegas, demonstrating poor judgment and conduct unbecoming an officer (Policy 340.3.5(z)).

Sixth, appellant had contact with Aguilera at the residence he shared with Lopez without informing command staff, constituting disobedience and insubordination (Policy 340.3.5(e)).

Seventh, in September 2010 appellant had contact with Aguilera at two different establishments while celebrating appellant's birthday and made an incomplete disclosure to Captain Charley Adams regarding the contact, constituting disobedience and insubordination (Policy 340.3.5(e)) as well as violating the prohibition against providing false and misleading statements to a superior (Policy 340.3.5(ab)). The disclosure, via e-mail, read: "I saw my cousin-in-law Joseph Aguilera at a lounge. He came up to me and said hello and walked away. ... Officer Nunn and I shortly left [*sic*] after I saw him."

Appellant, accompanied by counsel, was interviewed in October 2010 concerning the second investigation. Appellant confirmed he had been living with Lopez and her daughter for a year and a half at the time of the October 2010 interview. Appellant stated Aguilera came to Lopez's house about once a week to pick up Lopez and Aguilera's daughter for visitation. Appellant claimed that he usually did not see Aguilera when he came for visitation but that on one occasion appellant had a "very brief" interaction with Aguilera in the house's living room. Appellant acknowledged that he should have notified command staff of his living situation since he knew Aguilera would be coming to the house frequently. Regarding seeing Aguilera at the funeral, appellant stated they consoled one another at the event. Appellant notified his immediate supervisor (Sergeant Cefalu) about the contact with Aguilera but not command staff. As for the evening in downtown Campbell, appellant acknowledged being "intoxicated," asking Sergeant Cefalu for a hug, and calling the sergeant an "ass" in a text message to the sergeant later that night. He also stated it was possible he told Sergeant Cefalu he was "hammered,"

but denied that he was drunk that night. Appellant agreed that he had indicated during the previous investigation that interacting with Kim Villegas was a conflict, admitted he was at the bar with her when Sergeant Livingston saw them, and stated he now recognized that he used poor judgment by dancing while on disability leave. Regarding his living situation, appellant claimed he and Lopez had arranged matters in a way that kept him from interacting with Aguilera but acknowledged seeing Aguilera briefly at the house on one occasion. Finally, appellant acknowledged he saw Aguilera at two bars while celebrating appellant's birthday in September 2010 but stated that the contacts were brief. According to appellant, Aguilera said " 'Hi, happy birthday' " and also offered to buy appellant a drink, which appellant declined.

C. TERMINATION, CITY COUNCIL DE NOVO HEARING, AND WRIT PROCEEDINGS

In December 2010, City Manager Daniel Rich sustained the allegations in Sergeant Shipman's report and terminated appellant. He appealed the decision to the City Council, which held a de novo hearing on multiple days in June and July 2011. The City Council heard testimony from numerous witnesses, including appellant.

Appellant admitted that Chief Finch had directed him not to associate with Padilla or Aguilera but he thought he was not prohibited from having contact with those individuals. He testified that he believed this distinction also extended to his duty to disclose interactions with those men to command staff (meaning "[t]he captains"), with disclosure only necessary in the event of an association. Regarding disclosure of associations, appellant stated he understood from the first investigation that failure to report associations could lead to his termination and admitted he did not appeal the first investigation or take any action to challenge the 2009 investigation's findings.

Counsel for respondents pointed out during his cross-examination of appellant that appellant had not previously relied on the distinction between contact and association when explaining his failure to notify command staff of his interactions with Aguilera and appellant acknowledged he had not provided that explanation during the October 2010

interview. Counsel also went through the allegations against appellant and allowed him to explain his actions. Regarding his living situation, appellant said he moved in with Lopez in March 2009 and acknowledged he did not tell the Department about this move at the April 2009 investigative interview or at the meeting with Chief Finch in July 2009. He explained that he did not see a need to disclose the change in residence because Aguilera did not actually live at the residence but conceded that he could understand that not disclosing the details of his living situation "would be a big deal." He also acknowledged that he incorrectly filled out the change of address form in October 2009 by listing the effective date of the address change as September 1, 2009 rather than the actual date of March 2009 but said he thought the effective date line was an area for him to enter the date that he filled out the form. He stated that he did not inform command staff of his interaction with Aguilera at the funeral because he told Sergeant Cefalu and the sergeant told him he would inform his superiors. Appellant also recognized "it was a bad decision" to be out in downtown Campbell after drinking, especially since he was on disability leave and would have otherwise been on duty that night. Appellant conceded that he could "see how [it] would be a problem" to be out dancing with Villegas because of "public perception of me ... dancing while I'm injured ... ." Finally, regarding his interactions with Aguilera for appellant's birthday, appellant testified that he did not think the interactions qualified as an association and that he notified Captain Adams of the interaction because he wanted to make sure he told command staff of the contact rather than them hearing about it from someone else.

The City Council upheld appellant's termination, finding that he violated the Department policies identified in Sergeant Shipman's report. The City Council further found that each of the following acts "would warrant termination in-and-of themselves:" (1) failure to notify the Department of his change in address and failure to candidly disclose his living situation; (2) failure to adequately disclose his contact with Aguilera in September 2010; (3) failure to report his contact with Aguilera at his grandmother's

funeral to command staff; and (4) failure to report his contact with Aguilera at appellant's residence.

Appellant then filed a verified petition for writ of administrative mandamus, which the court denied by written order after a hearing. The order found that the weight of the evidence in the administrative record supported the City Council's findings that appellant violated Policies 340.3.1(d), and 340.3.5(e), (o), and (ab). The trial court did not address the City Council's findings that appellant's actions in downtown Campbell and at the bar with Kim Villegas violated Policy 340.3.5(z).

II. DISCUSSION

A. FAILURE TO FOLLOW RULES OF COURT

Respondents argue that we should affirm the trial court's decision because appellant filed an oversized brief without seeking permission and failed to support arguments in his brief with citations to the record. (Citing Cal. Rules of Court, rule 8.204(a)(1)(C), (c)(1).) The word count certification of appellant's Opening Brief states the brief contains 18,871 words, which is 4,871 words longer than the 14,000-word limit for civil appeals. (Cal. Rules of Court, rule 8.204(c)(1).) In his Reply Brief, appellant apologized for the violation, requested that we disregard the noncompliance, and stated "[a]ppellant has separately submitted an application to allow for the oversized brief, *nunc pro tunc*." However the docket for this case shows no such application. That failure notwithstanding, in the interest of judicial economy we deem appellant's Reply Brief statements as an application to file an oversized brief and grant that request.

As for proper citations to the record, we have concerns about both parties' briefs. Rule 8.204(a)(1)(C) requires parties to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Appellant's Statement of Facts properly supports factual statements with citation to volume and page numbers, but appellant fails to cite the record for the majority of his Legal Argument. While respondents cite record page numbers throughout their briefing,

they never include volume numbers. We decline respondents' request to disregard appellant's arguments and note that both parties' deviations from the rule impeded our review.

B. SCOPE OF REVIEW

Appellant challenges the 2009 investigation's findings that Aguilera and Padilla were "persons who engage in or are continuing to engage in serious violations of state or federal laws" and that appellant improperly associated with them in violation of Policy 340.3.5(v). However, as appellant conceded before the City Council, he never appealed the 36-hour suspension that resulted from the 2009 investigation or otherwise challenged its findings despite being given the opportunity to do so. Having failed to challenge that decision, he is collaterally estopped from now challenging the findings of the 2009 investigation. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 ["It is settled that the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity."].) Further, respondents' decision to terminate appellant in 2010 was not based on violations of Policy 340.3.5(v) but rather based on, among other things, his failure to comply with Chief Finch's explicit directive not to associate with Padilla or Aguilera, which implicated Policy 340.3.5(e), which prohibits "refusal or deliberate failure to carry out or follow lawful directives ... ."

Additionally, though appellant challenges the City Council's findings that his conduct in downtown Campbell and at a bar with Kim Villegas violated Policy 340.3.5(z) (prohibiting conduct unbecoming an officer), the trial court did not make findings related to these allegations, instead resting its denial of appellant's petition on the other allegations against appellant. As such, our review extends only to whether substantial evidence supported the trial court's findings related to appellant's alleged violations of Policies 340.3.1(d), and 340.3.5(e), (o), and (ab).

C. CONSTITUTIONAL CHALLENGES

We review the trial court's legal determinations on appellant's constitutional claims de novo. (*Bautista v. County of Los Angeles* (2010) 190 Cal.App.4th 869, 875 (*Bautista*).) Respondents suggest we need not decide appellant's constitutional issues because the case can be decided on other grounds. Because one of the main reasons for appellant's termination was his failure to abide by Chief Finch's directive not to associate with Aguilera, we will address appellant's challenges to the directive. However, we do not reach appellant's Fourth Amendment to the Constitution of the United States claim related to the use of a GPS tracking device on appellant's vehicle because the City Council did not rely on any tracking information to support its findings and appellant freely admitted during the investigation (while assisted by counsel) that he had been at various locations. Nor do we reach appellant's constitutional challenges to Policy 340.3.5(v) because, while the 2009 disciplinary action was based on that policy, the 2010 termination decision was based on violations of other policies. Though never put in writing, the parties agree that Chief Finch's directive forbade association between appellant and Aguilera.

1. Chief Finch's Directive Was Not Unconstitutionally Vague

Appellant claims forbidding him from associating with Aguilera and Padilla is unconstitutionally vague because it is unclear what was meant by the term "association." "[A] statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*Connally v.General Const. Co.* (1926) 269 U.S. 385, 391.) The "prohibition against vagueness has been held to extend to administrative regulations affecting conditions of governmental employment." (*Arellanes v. Civil Service Com.* (1995) 41 Cal.App.4th 1208, 1216 (*Arellanes*).) Because the challenged directive applied only to appellant, there is no

distinction between a facial and an as applied challenge and we will thus only examine whether the directive was unconstitutionally vague as applied to appellant.

An argument similar to appellant's was rejected in *Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1332 (*Bailey*). Bailey was a police officer who was terminated "when he continued to have contacts with an old friend [named Smith] (who had been convicted of a felony) after being warned not to do so, thus violating rule 3.3 which prohibited continuous personal associations with felons." (*Id.* at p. 1324.) On appeal from his termination, Bailey argued the prohibition of "continuing associations" was unconstitutionally vague "because he did not know how much contact he could maintain with Smith without transgressing the rule against continuous associations." (*Id.* at p. 1329.)

The *Bailey* court observed that the "government may permissibly place limits on a public employee's constitutionally protected rights which could not be imposed on a private person," and noted "the unique position occupied by police officers subjects them to an even higher standard of conduct than other employees." (*Bailey, supra,* 226 Cal.App.3d at p. 1328.) The court acknowledged that the challenged rule "does not set forth a numerical formula for determining the precise number or frequency of permissible contacts" but found that "a statute is not rendered vague by the lack of such precision." (*Id.* at p. 1329.) While conceding that there might be ambiguities in the rule "as applied to hypothetical situations involving borderline conduct," the core of proscribed conduct was the prohibition of "ongoing personal relationships with felons." (*Ibid.*) Because Bailey's "conduct and admitted contacts with Smith and Smith's wife" fell within that core of proscribed conduct, the rule was not vague as applied to him. (*Id.* at p. 1330.)

Like the rule at issue in *Bailey*, the core of proscribed conduct in Chief Finch's directive was the prohibition of any association between appellant and Aguilera. By living at a residence that appellant knew Aguilera would visit at least weekly, appellant

put himself within the core of proscribed conduct. By his own admission at the de novo hearing, appellant conceded he could now see how not disclosing the details of his living situation "would be a big deal." Finally, that appellant thought incidental contact with Aguilera did not fall within the prohibition of associating with Aguilera does not render the directive unconstitutionally vague. (*Smith v. Peterson* (1955) 131 Cal.App.2d 241, 245–246 ["[T]here is a uniformity of opinion among the authorities that a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. Nor does the fact that its meaning is difficult to ascertain or susceptible of different interpretations render the statute void."].)

2. Chief Finch's Directive Was Not Unconstitutionally Overbroad

Appellant argues Chief Finch's directive is unconstitutionally overbroad. "[A] person to whose conduct a law clearly applies cannot avoid its penalties merely because the statute may be vague or unconstitutionally overbroad when applied to the conduct of others." (*Bailey, supra*, 226 Cal.App.3d at p. 1330.) However, "[w]hen First Amendment concerns are substantially implicated by the challenged statute, the traditional rules of standing are altered to permit attacks on overly broad statutes without requiring the litigant to demonstrate his own conduct could not be regulated by a narrowly drawn statute." (*Id.* at pp. 1330–1331, italics omitted.) Appellant claims First Amendment concerns are substantially impacted by Chief Finch's directive because he and Aguilera are both members of the same religious faith and appellant is the godfather of Aguilera's child. This argument is not persuasive. At most, Chief Finch's directive was a neutral statement that imposes an incidental burden on appellant's exercise of religion. As such, appellant has not carried his "burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists. [Citation.]" (*Virginia v. Hicks* (2003) 539 U.S. 113, 122.)

3. Chief Finch's Directive Does Not Violate Appellant's Right to Intimate Association

Appellant argues the directive violated his constitutional rights to intimate association (by impeding his familial relationship with Aguilera) and expressive association (by preventing him from practicing his Catholic faith with Aguilera). "While the right to expressive association protects those activities incident to exercising one's First Amendment rights—speech, assembly, petition for the redress of grievances and the exercise of religion—the right to intimate association is protected as an 'intrinsic element of personal liberty.' [Citation.]" (*Bautista, supra,* 190 Cal.App.4th at p. 875, quoting *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 620.) "The highly personal relationships sheltered by this guarantee of intimate association include 'those that attend the creation and sustenance of a family,' including marriage, childbirth and cohabitation with one's relatives. [Citation.]" (*Bautista*, at pp. 875–876.)

Bautista is instructive. Bautista was terminated from his job as a peace officer for having an ongoing relationship (that eventually led to marriage) with "a known prostitute and heroin addict" named Shawn Crook, in violation of a policy that stated officers "shall not knowingly maintain a personal association with persons who are under criminal investigation or indictment and/or who have an open and notorious reputation in the community for criminal activity, where such association would be detrimental to the image of the Department ... ." (*Bautista, supra,* 190 Cal.App.4th at p. 871.) Bautista challenged the policy, arguing that the strict scrutiny standard applied because he eventually married Crook and the policy infringed on his fundamental right to marry as well as his Fourteenth Amendment right to intimate association. (*Id.* at pp. 875–876.) The Court of Appeal disagreed, noting that the policy "does not deny a class of persons the fundamental right of marriage" altogether and rather "affects that right only incidentally ... ." (*Id.* at pp. 876–877.) For this reason, the court applied the rational basis standard and upheld the policy because it was rationally related to the "legitimate

interest in regulating the behavior of its sworn officers to minimize conflicts of interests and protect the credibility and integrity of the Department." (*Id.* at p. 877.)

Appellant claims strict scrutiny should apply to our review of Chief Finch's directive because it unconstitutionally interfered with his right of intimate association with Aguilera, Lopez, and his niece. However, the directive did not deny appellant any fundamental right. While it arguably impacted appellant's right to cohabit with Lopez and her daughter, it did so only incidentally because there is no evidence that the Department would have forbade him from living with Lopez had appellant actually disclosed the living situation to the Department. We thus apply the rational basis standard of review and will uphold the directive if it was rationally related to a legitimate government interest. (*Bautista, supra,* 190 Cal.App.4th at p. 877.) As Sergeant Livingston testified at the de novo hearing, the Department has legitimate interests in preventing officers from disclosing confidential information to criminals (either intentionally or inadvertently) and preventing conflicts of interest (and situations where conflicts might arise). Chief Finch's directive that appellant not associate with Aguilera—who the Department had previously identified as an active gang member—was rationally related to those legitimate interests. As such, the directive did not violate appellant's right to intimate association.

4. Chief Finch's Directive Does Not Violate Appellant's Right to Expressive Association

Appellant claims Chief Finch's directive violates his First Amendment right to expressive association with Aguilera, citing their shared Catholic faith and appellant's status as the godfather to Aguilera's daughter. However, the directive only incidentally affected appellant's First Amendment rights because it did not prohibit him from associating with any other member of the Catholic faith or even his niece/goddaughter. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law

proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes).' [Citation.]" (*Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 879–880; see also *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1156 [finding no religious exemption from generally applicable Unruh Civil Rights Act].) Because Chief Finch's directive required appellant to disassociate with Aguilera and was not based on the faith of appellant or Aguilera, it was a neutral, generally applicable directive that did not unconstitutionally interfere with appellant's First Amendment rights.

5. Chief Finch's Directive Did Not Violate Appellant's Right to Privacy Under the Federal Constitution

Appellant claims Chief Finch's directive violated his federal constitutional right to privacy. Appellant cites *Thorne v. City of El Segundo* (1983) 726 F.2d 459 (*Thorne*), where the Ninth Circuit found that the city's use of an applicant's affair with a city police officer to deny the applicant a police officer position violated the applicant's federal constitutional right to privacy. (*Id.* at pp. 462, 470–471.) But *Thorne* is distinguishable because the intimate relationship in that case is far different from appellant's relationship with Aguilera, with whom appellant steadfastly denied associating and whose only familial connection to appellant was by marriage to his cousin. Also, *Thorne* suggested that the invasion of privacy in that case might be overcome by a "showing that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy and free association have an impact upon an applicant's on-the-job performance, and of specific policies with narrow implementing regulations ... ." (*Thorne*, at p. 471.) Even assuming arguendo that appellant's relationship with Aguilera was "of the type protected by the constitutional guarantees of privacy" (*ibid)*, the Department showed that appellant's association would negatively impact appellant's on-the-job performance by creating the risk of a conflict of interest between appellant and the Department, and the directive that appellant disassociate from Aguilera was specific and narrow.

Further, The Ninth Circuit has since rejected attempts to expand the holding of *Thorne* to cases involving much closer relationships than the one between appellant and Aguilera. (See *Fugate v. Phoenix Civil Service Bd.* (1986) 791 F.2d 736, 737–738, 741 [rejecting claim that right to privacy extended to terminated police officer's sexual relationships with prostitutes that occurred while on duty]; *Fleisher v. City of Signal Hill* (1987) 829 F.2d 1491, 1492–1493, 1498 [rejecting terminated officer's claim that right to privacy extended to his sexual relationship with a minor].) Because we do not find appellant's relationship with Aguilera to be of the type protected by the federal constitution's right to privacy (and because the Department had ample justification for Chief Finch's directive even if the relationship was protected), the directive did not violate appellant's federal constitutional right to privacy.

6. Chief Finch's Directive Did Not Violate Appellant's Right to Privacy Under the California Constitution

Appellant's final constitutional argument is that Chief Finch's directive violated his right to privacy under article 1, section 1 of the California Constitution, which provides that "[a]ll people are by nature free and independent and have inalienable rights," including the right to privacy. (Cal. Const., art. I, sec. 1.) To prevail, appellant must show: (1) he has a "legally protected privacy interest"; (2) his expectation of privacy was reasonable; and (3) "the intrusion is so serious in 'nature, scope, and actual or potential impact [as] to constitute an egregious breach of the social norms.' [Citation.]" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 287 (*Hernandez*).) Assuming appellant had a legally protected privacy interest, which includes " 'conducting personal activities without observation, intrusion, or interference' [Citation]," (*Hernandez,* at p. 287), in associating with Aguilera, after the 2009 investigation and disciplinary action any expectation of privacy by appellant in that relationship was unreasonable. The findings of the 2009 investigation, which appellant never challenged, led to the clear directive from Chief Finch to disassociate from Aguilera. From the

moment Chief Finch made that directive, appellant could not have reasonably expected privacy in any relationship with Aguilera. For this reason, his California Constitutional privacy argument fails.

D. VIOLATION OF CHIEF FINCH'S DIRECTIVE AND DEPARTMENT POLICIES

1. Standard of Review

Code of Civil Procedure section 1094.5 provides two alternative standards of review for trial courts to apply when reviewing a petition for writ of administrative mandate, "depending on the nature of the rights involved." (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057 (*JKH Enterprises*).) When the administrative agency decision implicates a " 'fundamental vested right,' " the trial court "exercises its independent judgment upon the evidence disclosed in a limited trial de novo in which the court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence." (*Ibid.*, quoting *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143–144.) In all other cases, "the superior court's review is limited to examining the administrative record to determine whether the adjudicatory decision and its findings are supported by substantial evidence in light of the whole record." (*JKH Enterprises*, at p. 1057.)

Regardless of which standard of review applies in the trial court, our standard of review is always substantial evidence. (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058.) If a fundamental vested right is implicated and the trial court exercises its independent judgment, we review whether substantial evidence supported the trial court's judgment. When the proper standard of review in the trial court is substantial evidence, our function is identical to that of the trial court and entails reviewing "the administrative record to determine whether the agency's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them." (*Ibid.*) And where, as here, the petitioner does not make a timely request for a statement of decision from the trial court (Code Civ. Proc., § 632), we "must infer any

finding to uphold the judgment that has substantial evidence in support in the administrative record[,]" (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 198–199 (*Smith*)), substantial evidence being evidence that "is reasonable in nature, credible and of solid value." (*JKH Enterprises,* at p. 1057.) Importantly, the standard is whether substantial evidence supports the decision, *not* whether more or better evidence in the record supports appellant's contentions.

2. Appellant's Evidentiary Objection to Respondents' Brief

In his Reply Brief, appellant argues that respondents improperly rely on various exhibits admitted before the City Council for the truth of the matters asserted therein when the parties purportedly agreed during the administrative proceedings that they would be used "to establish that those notices were sent" and not "for the truth of the matter of any alleged hearsay that might be in there." We note that the written decision of the City Council recognized a disagreement between the parties about the applicability of technical rules of evidence to the administrative proceedings and concluded that in light of the disagreement the City Council would apply the City of Campbell's general Personnel Rule 21.5, which states that " '[h]earings need not be conducted according to the technical rules relating to evidence and witnesses.' " It is unnecessary for us to resolve this evidentiary issue because appellant's statements, both during the investigation and at the de novo hearing, provide substantial evidence to support the trial court's findings.

3. Substantial Evidence Supports Finding of Failure to Inform Department of Residence Address Change Within 24 Hours and Failure to Candidly Disclose Living Situation (Policies 340.3.1(d), 340.3.5(o), 340.3.5(ab))

Appellant appears to suggest that to violate Policy 340.3.1(d) his failure to inform the Department of his change in residence address had to be intentional. However, that policy prohibits *any* "[f]ailure to notify the Department within 24 hours of any change in residence address" regardless of whether appellant intended to withhold the information. Because appellant admitted moving in with Lopez in March 2009 and not informing the

human resources department until October 2010, substantial evidence supported the trial court's finding that he violated Policy 340.3.1(d).

Substantial evidence also supported the trial court's finding that appellant violated Policy 340.3.5(o), prohibiting the "[f]ailure to disclose, or misrepresenting material facts, or the making of any false or misleading statement on any ... official document ... ." Appellant acknowledged that the change of address form he provided the human resources department stated he moved in September 2009 when he had actually moved in March 2009 but claimed that error was unintentional. However, appellant's explanation that he thought the "effective date" of address change line was the place to put the current date does not explain this error because he signed and dated the bottom of the form as "10-1-09" but wrote "9-1-09" as the "effective date" of the new address on that same page. Because appellant's explanation for the error is not consistent with his own actions, the City Council and the trial court did not err in disregarding his self-serving explanation and substantial evidence supports the trial court's finding that appellant violated Policy 340.3.5(o).

Finally, appellant challenges the trial court's finding that appellant's failure to inform command staff that he had moved into a residence that Aguilera would visit at least weekly violated Policy 340.3.5(ab) (prohibiting the omission or misrepresentation of material information to a supervisor). Appellant argues that he candidly disclosed his living situation during the 2009 investigation by telling the investigating sergeants that he had moved out of Villegas's house and suggests that because they did not ask follow-up questions he did not omit material information. However, informing the sergeants that he had left Villegas's house without also telling them he was moving into an environment where interaction with Aguilera was virtually guaranteed was not a candid response. Indeed, appellant acknowledged as much during the October 2010 interview, where he said "I should have notified them" of the details of his living situation during the 2009 investigation. Appellant also conceded at the de novo City Council hearing that he could

see that not disclosing the details of his living situation "would be a big deal." These statements provided substantial evidence to support the trial court's finding that appellant violated Policy 340.3.5(ab).

4. Substantial Evidence Supports Finding of Disobedience and Insubordination in Not Following Chief Finch's Directive and Misrepresenting Interactions with Aguilera (Policies 340.3.5(e), 340.3.5(ab))

Appellant's argument regarding disobedience and misrepresentation is not that he never had contact with Aguilera but rather that these contacts never rose to the level of "associations" and therefore did not implicate Chief Finch's directive that appellant report them to command staff. However appellant did not rely on this semantic argument until he appealed his termination to the City Council. And substantial evidence in the record of his actions leading up to the 2010 investigation provided evidence from which the trial court could find that appellant disobeyed Chief Finch's directive and misrepresented certain interactions with Aguilera. Appellant admitted seeing Aguilera in appellant's living room on one occasion and also admitted he did not disclose that interaction to command staff. He also admitted that he interacted with Aguilera at appellant's grandmother's funeral, they consoled each other, and that while he told Sergeant Cefalu about the interaction he did not inform command staff. These admitted failures to report interactions with Aguilera provided substantial evidence to support the trial court's finding that appellant was insubordinate and disobedient, in violation of Policy 340.3.5(e).

As for his interactions with Aguilera for appellant's birthday, appellant claims he complied with Chief Finch's directive by sending an e-mail to Captain Adams, where he said: "I saw my cousin-in-law Joseph Aguilera at a lounge. He came up to me and said hello and walked away. ... Officer Nunn and I shortly left [*sic*] after I saw him." However, during his interview in October 2010 appellant disclosed that in addition to the contact disclosed in the e-mail he also interacted with Aguilera at a second bar where

Aguilera stood near appellant and offered to buy him a drink. This incomplete disclosure provided substantial evidence to support the trial court's finding that appellant violated Policy 340.3.5(ab) by "[g]iving false or misleading statements, or misrepresenting or omitting material information to a supervisor ... in the reporting of any department related business."

E. TERMINATION DISPOSITION

"In a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (*Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87; accord *Bautista, supra,* 190 Cal.App.4th at p. 879.) " 'It is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown.' [Citation.]" (*Bautista,* at p. 879.) This is not such an exceptional case. Substantial evidence supports the trial court's findings that appellant violated a number of Department policies, including failing to comply with direct orders from his superior officers. Further, the disciplinary investigation that led to his termination was the second in two years involving appellant. On this record, appellant has not shown that respondents' decision to terminate him was an abuse of discretion.

III. DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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Grover, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Márquez, J.

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